No. 97-6203

Supreme Court, U.S.
FILED
MAY 1 1998

In The

Supreme Court of the United States

October Term, 1997

NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

UNITED STATES V. NATHANIEL JONES
NO. 97-6203

Date	Proceedings
	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CALIFORNIA CASE NO. CR-F-92-5264 REC
12/30/92	Indictment returned.
1/11/93	Arrest of Nathaniel Jones.
1/13/93	Initial appearance of Nathaniel Jones; arraignment and appointment of counsel.
7/27/93	Jury selected and sworn. Evidence commences.
7/29/93	Jury returns a guilty verdict on Counts 1 and 2.
12/13/93	Sentencing hearing held; sentence imposed.
12/14/93	Judgment entered. Imprisonment for a term of 360 months; $100 special assessment; supervised release for a term of 5 years; $2,120 restitution.
12/23/93	Notice of Appeal filed to United States Court of Appeals for the Ninth Circuit.
	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NO. 93-10779
4/12/94	Appellant's Opening Brief and Excerpts of Record Filed.

5/27/94	Appellee's Brief filed.
6/13/94	Appellant's Reply Brief filed.
12/12/94	Oral Argument.
1/10/95	Order issued directing parties to file simultaneous supplemental briefs addressing whether the 25 year statutory maximum under 18 U.S.C. § 2119(2) applies and whether the district court could properly depart upward to reach a total maximum sentence for defendants of 30 years on the basis of United States Sentencing Guideline § 2K2.4 alone.
1/27/95	Appellee's Supplemental Brief filed.
1/30/95	Appellant's Supplemental Brief filed.
7/6/95	Opinion filed by 9th Circuit; Affirming in part, Reversing in part, and Remanding to the District Court. Judgment filed and entered.
8/29/95	Mandate issued.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CALIFORNIA CASE NO. CR-F-92-5264 REC

11/8/95	District Court issues order to vacate Judgment and matter set for resentencing.
3/25/96/	Resentencing hearing. Sentence imposed.

3/27/96	Amended Judgment entered. Imprisonment for a term of 300 months; $100 special assessment; supervised release for a term of 5 years; $2,120 restitution.
4/4/96	Notice of Appeal filed to the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NO. 96-10179

7/19/96	Appellant's Opening Brief filed.
8/23/96	Appellees's Brief filed.
4/21/97	Order filed submitting case on briefs without oral argument.
6/27/97	Memorandum Opinion entered affirming judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DONOVAN D. OLIVER, NATHANIEL JONES, and DARRYL MCMILLAN, Defendants.	CR. NO. CR-F 92-5264-REC VIOLATIONS: 18 U.S.C. § 2119 – Carjacking; 18 U.S.C. § 924(c)(1) – Use of a Firearm During and In Relation to a Crime of Violence

INDICTMENT

COUNT ONE: [18 U.S.C. § 2119 – Carjacking; 18 U.S.C. § 2 – Aiding and Abetting]

The Grand Jury charges: T H A T

DONOVAN D. OLIVER,
NATHANIEL JONES and
DARRYL MCMILLAN,

defendants herein, on or about December 7, 1992, in the County of Kern, State and Eastern District of California, while possessing a firearm, to wit: a .45 caliber Volunteer Enterprises semi-automatic rifle, serial number 11394, did take a motor vehicle, to wit: a 1987 Honda Accord, California license number 2 EWB936, vehicle identification number JHMCA5634HC078962, that had been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force, violence and intimidation, in violation of Title 18, United States Code, Sections 2119 and 2.

COUNT TWO: [18 U.S.C. § 924(c)(1) – Use of a Firearm During and In Relation to a Crime of Violence; 18 U.S.C. § 2 – Aiding and Abetting]

The Grand Jury further charges: T H A T

DONOVAN D. OLIVER,
NATHANIEL JONES and
DARRYL MCMILLAN,

defendants herein, on or about December 7, 1992, in the County of Kern, State and Eastern District of California, did knowingly use and carry a firearm, to wit: a .45 caliber Volunteer Enterprises semi-automatic rifle, serial number 11394, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, to wit, carjacking as alleged in Count One above, in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

A TRUE BILL.

/s/ Illegible
FOREPERSON

/s/ George L. O'Connell
GEORGE L. O'CONNELL
United States Attorney

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Case No. CRF 92-5264-REC
Plaintiff,	Fresno, California Wednesday, January 13, 1993
vs.	
NATHANIEL JONES,	Arraignment
Defendant.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENNIS L. BECK
UNITED STATES MAGISTRATE JUDGE

• • •

[p. 1] FRESNO, CALIFORNIA,
WEDNESDAY, JANUARY 13, 1993

THE CLERK: We call CRF 92-5264, USA versus Nathaniel Jones, arraignment and plea.

(Pause)

THE COURT: All right. Is your true name Nathaniel Jones?

MR. JONES: Yeah.

THE COURT: All right. Mr. Jones, you're charges in an indictment filed with this Court with a violation of Title 18, Section 2119, carjacking, and in violation of Title 18, Section 2, aiding and abetting. In other words, it's alleged that you aided and abetted in carjacking.

It's further alleged that you violated Title 18, Section 924(c)(1), and Title 18, Section 2 in that you used a firearm or aided and abetted in the use of a firearm in relation to a crime of violence. This offense is punishable –

MR. HANLY: Fifteen years and two-fifty on count one, with a five year consecutive on count two.

THE COURT: All right. By a crime of up to 15 years – that is a penalty of up to 15 years in custody and/or $250,000 on count one, the carjacking, if convicted on count one. And count two, the use of a firearm or found to, that would be an additional five years consecutive, [p. 2] which would be required to be imposed.

The – you're entitled to remain silent. Anything you say can and will be used against you. You're requesting an attorney be appointed? Do you want an attorney appointed for you?

(No audible response)

THE COURT: I'll appoint the Federal Defender to represent you in this matter. You're entitled to have your attorney present at all proceedings before this Court, Mr. Jones. And you've received a copy of the indictment on behalf of Mr. Jones, Mr. Balazs?

MR. BALAZS: Yes, Your Honor. And Mr. Jones' name is correctly spelled in the indictment and we waive further reading of his statutory and constitutional rights.

THE COURT: All right. Is the Government seeking detention, Mr. Hanly?

MR. HANLY: Yes, Your Honor.

THE COURT: All right.

MR. BALAZS: Your Honor, we waive a detention hearing.

THE COURT: I'm sorry?

MR. BALAZS: We waive the detention hearing.

THE COURT: All right. Do you submit the matter?

MR. BALAZS: Yes, Your Honor.

THE COURT: All right. I've received a verbal [p. 3] report from Pretrial Services indicating that Mr. Jones has a significant prior criminal record, including two convictions – I'm sorry, three convictions for robbery, one conviction for assault with a deadly weapon, and one for possession of rock cocaine for sale.

Further indications are that he was arrested for this offense and it's alleged to have been committed while he was on parole and while he has – was an absconder from parole supervision, and finally that a no-bail parole hold has been lodged against him.

I'll find by a preponderance of the evidence there are no conditions or combination of conditions which will assure his appearance based on the aforestated factors. I also find by clear and convincing evidence that there are no conditions or combination of conditions which will assure the safety of the community and others.

I base this on the fact that he has four prior convictions involving crimes of force or threat of deadly force against the person of others, that he – this offense was

alleged to have involved a threat of force against others in a violent – is a violent crime, and that he committed this offense – or allegedly committed this offense while on parole.

I will order him detained on that basis as well and set the matter for status conference – is the 19th too [p. 4] soon?

MR. BALAZS: That's fine, Your Honor.

MR. HANLY: We have two other defendants who are coming up from Bakersfield –

THE COURT: Twenty-fifth?

MR. HANLY: – in this same – we could do 25th. That might give us more time to –

THE COURT: Is that agreeable?

MR. HANLY: – get them up here.

MR. BALAZS: That's fine, Your Honor.

THE COURT: All right. I'll order the matter set for status conference before Judge Coyle in courtroom one on Monday, January 25th at 9:00 a.m.

MR. HANLY: Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Jones.

(Whereupon, the proceedings in the above-entitled cause were concluded.)

* * *

United States District Court
for the Eastern District of California

JURY INSTRUCTION

(Caption Omitted In Printing)

ELEMENTS OF THE OFFENSE

The defendants are charged in Count 1 of the indictment with carjacking in violation of Section 2119, Title 18 of the United States Code. That section provides, in part, that: Whoever, possessing a firearm, takes a motor vehicle that has been transported, shipped, or received in interstate commerce or foreign commerce, from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall be guilty of an offense against the United States.

As indicated by this section, in order for the defendants to be found guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt: First, while possessing a firearm, defendants took a motor vehicle. Second, the motor vehicle had been transported, shipped or received in interstate or foreign commerce. And third, the defendants took the vehicle by force and violence or by intimidation.

[*U.S. v. Nathaniel Jones*, CR-F-92-5264 REC, Reporter's Transcript, Jury Trial, July 28, 1993, pp. 533:19-25, 534: 11-13]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]	)	No. CR-F-92-5264
	)	SENTENCING ORDER
	)	

At their jury trial on July 29, 1993, defendants were found guilty of carjacking and use of a firearm (45 caliber semi-automatic rifle) during and in relation to a crime of violence. Evidence presented at trial showed that defendants accosted two men in a blue Honda, searched their pockets, and stole their money. Victim Muthanna was held at gunpoint by defendant Oliver. Defendant Jones drove Victim Mardaie away in the Honda as he searched the second victim for more money. They went about a block, driving slowly, before Defendant Jones pushed Mr. Mardaie out of the car.

Meanwhile, as Victim Muthanna tried to get up off the ground, defendant Oliver fired one round at close range, causing Mr. Muthanna to fall back on the ground. Defendant Oliver then stuck the barrel of the rifle into Mr. Muthanna's ear and slapped and kicked him on the left side of his face and head. The defendants attempted to flee, but were apprehended by law enforcement officials. In trying to evade apprehension, defendant Jones crashed the Honda, causing approximately $2,000 in damage. Victim Muthanna's ear swelled and bled, and was very painful for several days. He may have suffered permanent hearing loss. Understandably, both victims were traumatized by the incident.

1. Statutory Maximum

The "carjacking statute" under which defendants were convicted provides:

> Whoever, possessing a firearm . . . takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall —
>
> (1) be fined under this title or imprisoned not more than 15 years, or both
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

18 U.S.C. § 2119.

Defendants claim that "serious bodily injury"[1] is an element of the offense and must be pleaded by the government and proven at trial in order for the higher statutory maximum of twenty-five years to apply. Failing that proof, defendants assert that this court may not sentence

[1] "The term 'serious bodily injury' means bodily injury which involves – A) a substantial risk of death; B) extreme physical pain; C) protracted and obvious disfigurement; or D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and the term 'bodily injury' means – A) a cut, abrasion, bruise, burn, or disfigurement; B) physical pain; C) illness; D) impairment of the function of a bodily ember [sic], organ, or mental faculty; or E) any other injury to the body, no matter how temporary." 18 U.S.C. § 1365.

defendants to more than fifteen years on Count One. In essence, defendant claims that 18 U.S.C. § 2119(1), 18 U.S.C. § 2119(2), and 18 U.S.C. § 2119(3) are all separate offenses.

This court finds, however, that carjacking is a single offense defined in Section 2119 and that sections (1) through (3) are merely sentencing provisions to be applied by the district court at sentencing. Due to the newness of the carjacking statute, there is no law directly on point. Thus, this court must look to analogous cases in which a statute specified different statutory maximums for varying degrees of the underlying offense. In *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991), the Ninth Circuit considered whether the dangerous or deadly weapons provision of 18 U.S.C. § 111 constituted a separate element or whether this provision was simply a "sentence enhancement." After analyzing the rationale of *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Ninth Circuit determined that its task was twofold. First, the court must determine whether Congress intended the provision to be a separate offense. *Young*. If Congress instead intended the deadly weapon provision as a sentence enhancement factor, then the court must determine whether constitutional considerations mandate that the provision be read as a separate offense, contrary to Congress' intent. *Id.* at 1054.

The Ninth Circuit examined the language of the statute; it noted that the provision was not "structurally separated" from the rest of the section. *Id.; contrast United States v. Medina, supra* (statutory sections referenced each other and were separately labelled). Similarly, the carjacking statute at issue in the case at bar includes separately

numbered provisions, but all follow the work "shall" and are not drafted as "stand-alone" offenses. *See Young*. Instead, as in *Young*, the provision at issue "incorporates the predicate acts by reference rather than affirmatively setting forth any specific elements." *Young*, 936 F.2d at 1054. *See United States v. Normandeau*, 800 F.2d 953 (9th Cir. 1986) (deciding that the quantity of drugs involved in offense is relevant only for sentencing enhancement; decision based in part on placement of penalties in a separate statutory provision and the fact that existence of drugs had already been proven at trial).

The court in *Young* went on to hold the deadly weapon sentence enhancement to be constitutional because the provision did not contain any impermissible presumptions and because it addressed the existence of a factor which is commonly considered at sentencing. Similárly the presence of serious bodily injury as a result of defendants' conduct is a commonly considered factor at sentencing.

II. Defendant Jones

The presentence report recommends a total offense level of 30 calculated by using 20 as the base offense level, adding 2 for robbery by intimidation pursuant to USSG § 2B2.1(b)(1)(B), 4 for serious bodily injury to Victim Muthanna, and adding 4 for Abduction to Facilitate Crime. The report recommends a criminal history category of VI for defendant Jones (13 criminal history points). This results in a guideline range of 168 to 210 months for Count One (carjacking) and a mandatory consecutive 60 months for Count Two (Use of a Firearm).

The guideline computation, when combined with the mandatory five years for Count Two, produces a total maximum penalty which is *less than* the maximum of the guideline range had there not been a conviction for Count Two. This anachronism results because, had there been no conviction for Count Two, the government could have asked for a seven level enhancement. USSG § 2K2.4, Application Note Two, states:

> an upward departure may be warranted so that the conviction under [Count Two – Use of a Firearm] does not result in a decrease of the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been [Count Two – Use of a Firearm].

USSG § 2K2.4, comment (n.2).

This court will upward departure on Count One and impose the mandatory sentence of Count Two for a total of 360 months. Upward departure is also based on the severe psychological trauma experienced by both victims, and Victim Muthanna's injury to his ear. For these reasons, the court determines that upward departure is appropriate.

A. Injury to Victim Muthanna

Defendant Jones also disputes that the events of the carjacking were the cause of Victim Muthanna's injury. Medical reports show that in March of 1992, after an automobile accident, Mr. Muthanna had undamaged eardrums. In January, 1993, forty-one days after the offense

occurred, the injury was discovered. Dr. Robert Downie, supervising physician, stated that the injury to the eardrum occurred at least one month prior to the examination and could have been caused by a slap to the face. Defendant Jones contests Dr. Downie's medical expertise and his conclusions and asserts an independent examination is necessary. The court rejects this argument.

Finally, Defendant Jones contests the diagnosis of Victim Muthanna's injuries as "chronic." Defendant states that a perforated eardrum *can* be treated by surgery and *can* heal. Neither argument is availing, as the definition of serious bodily injury, as defined in USSG § 1B1.1(j), is satisfied by Mr. Muthanna's pain and hearing loss.[2]

B. Abduction of Individual

Defendant Jones contests the four level enhancement under USSG § 2B3.1(b)(4)(A) for abduction of individual to facilitate an offense. Defendant maintains that although Victim Mardaie was in the car when Defendant Jones drove it away, there was no evidence that the victim's presence facilitated commission of the offenses in any way.

For Victim Mardaie to have been "abducted" within the meaning of the Guidelines, he must have been

[2] The Guidelines define "serious bodily injury" as "injury involving extreme pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. As used in the guidelines, the definition of this term is somewhat different than that used in various statutes." USSG § 1B1.1(j).

"forced to accompany an offender to a different location." USSG § 1B1.1, comment 1(a). Clearly, that requirement is satisfied, even if the different location was mere feet from where defendant Jones initially began. The evidence at trial indicated that defendant Jones continued to search Victim Mardaie for money while he was abducting him. Although not as dramatic as using a witness as a human shield to facilitate robbery or escape, such asportation nonetheless qualifies for the enhancement. The commentary simply states, "The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location." USSG § 2B3.1, comment (backg'd).[3]

C. Acceptance of Responsibility

Defendant Jones asserts that his statement to the probation officer entitles him to a two level adjustment for acceptance of responsibility as set forth in USSG § 3E1.1(a). Defendant Jones stated that he had been drinking all day, that he and his co-defendants took his sister's Cadillac to go to the liquor store, and that he went off to a field to relieve himself. When he returned, he saw that Oliver was pointing a gun in the direction of the victims. He told probation officer that he became scared, so he jumped in the Honda to get away.

[3] Due to this court's holding on this issue, it is unnecessary to rule on the government's argument that Defendant Oliver "abducted" Victim Muthanna from the car by moving him several feet and holding him at gunpoint.

The Guidelines indicate that to obtain a reduction of acceptance of responsibility, the defendant should truthfully admit the conduct comprising the offense of conviction, admit or *not deny* any relevant conduct. USSG § 3E1.1, comment. Mr. Jones' version falls far short of the Guidelines' definition of "acceptance of responsibility."

• • •

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DONOVAN DWAYNE OLIVER; DARRYL LEE MCMILLAN; NATHANIEL JONES, *Defendants-Appellants.*	Nos. 93-10770 93-10775 93-10779 D.C. No. CR-92-05264-REC OPINION

Appeals from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
December 12, 1994* – San Francisco, California

Filed July 6, 1995

Before: Procter Hug, Jr., William C. Canby, Jr.
and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

OPINION

HAWKINS, Circuit Judge:

Defendants Donovan Dwayne Oliver, Darryl Lee McMillan, and Nathaniel Jones appeal their convictions and sentences for carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and using a firearm

* Submitted on the briefs as to No. 93-10775.

during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

I.

Background

The evidence at trial disclosed the following facts: On December 7, 1992, Oliver, Jones and McMillan drove to a liquor store in Bakersfield, California. In the liquor store parking lot, they approached Ali Nassar Mutanna and Abdullah Mardaie, who were in Mardaie's parked car. After ordering Mutanna and Mardaie out of the car, Oliver held them at gunpoint. Oliver stuck the barrel of his firearm into Mutanna's left ear and held it there to ensure that Mutanna would not move, causing Mutanna's ear to bleed profusely. Meanwhile, Jones and McMillan searched Mutanna's and Mardaie's pockets. Oliver then forced Mutanna behind the liquor store, ordered him to lie on the ground, and struck him in the head while he was lying there. Oliver told Mutanna that Oliver would kill him if he moved. Oliver then got into Jones' car, which was being driven by McMillan, and fired a shot as they drove away.

Jones had forced Mardaie into Mutanna's car, and Jones followed Oliver and McMillan as they left the scene. After they travelled a short distance, Jones ordered Mardaie out of the car.

After defendants left, Mutanna flagged down a police car. Police officers located Mutanna's car a few blocks away from the liquor store. Jones fled in Mutanna's car

when he noticed the police car approaching. After a short car chase, Jones crashed Mutanna's car and was apprehended. Jones' car was also located nearby, with the gun used by Oliver in the back seat. Oliver and McMillan were arrested shortly thereafter.

Defendants were indicted on December 30, 1992, with one count of carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and one count of using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). On July 29, 1993, defendants were convicted by a jury on all counts. Defendants were sentenced under the 25-year (300 months) statutory maximum set forth in § 2119(2), because Mutanna suffered serious bodily injury during the crime. Defendants were each sentenced to a total of 300 months on the carjacking count and a consecutive 60 months for the use of a weapon.

Defendants timely appealed their sentences and convictions on December 17, 1993.

II.

Grand Jury Indictment

Defendants Oliver and McMillan first argue that the district court lacked jurisdiction because the indictment against them was returned in a courtroom closed to the public. *See* Rule 6(f), Fed.R.Crim.P. ("indictment[s] shall be returned by the grand jury to a federal magistrate in open court"). "[E]rrors in the grand jury indictment procedure are subject to harmless error analysis unless 'the structural protections of the grand jury have been compromised as to render the proceedings fundamentally

unfair.' " *United States v. Lennick*, 18 F.3d 814, 817 (9th Cir. 1994) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-57 (1988)). Because defendants do not claim prejudice as a result of the indictment being returned in a closed courtroom, any defect was harmless. In any event, defendants did not raise this issue before the district court, so they waived the right to raise the issue on appeal. *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (objection based upon the failure to return an indictment in open court is not jurisdictional and is waived if not raised prior to trial); Rule 12(b)(1), Fed. R. Crim. P.

III.

Commerce Clause

Defendants contend that Congress exceeded its power under the Commerce Clause in enacting the carjacking statute, because carjacking is not sufficiently related to interstate commerce. We recently rejected this argument in *United States v. Martinez*, 49 F.3d 1398, 1400-01 (9th Cir. 1995). In so ruling, we joined with every other circuit court that had addressed the question.

The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not alter our view. In Lopez, the Supreme Court held that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of a school. *See* 18 U.S.C. § 924(q). The Court noted that "Sec. 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that

the firearm possession in question affects interstate commerce." *Id.* at at 1631. It also explained that the statute does not seek to protect "an instrumentality of interstate commerce." *Id.* at 1630. Finally, the Court pointed out that there was no showing of a substantial effect of the prohibited activity on interstate commerce, and Congress had made no findings that there was such an effect. *Id.* at 1631-32.

The carjacking statute has a very different background. First, it applies only to the forcible taking of a car "that has been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C. § 2119. *See United States v. Hanna*, No. 94-10131, Slip Op. at 5965-66 & n. 2 (9th Cir., May 31, 1995) (holding that "[18 U.S.C. § 922(g)'s] requirement that the firearm have [sic] been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause"). Second, cars are themselves instrumentalities of commerce, which Congress may protect. *See United States v. Watson*, 815 F. Supp. 827, 831 (E.D. Pa. 1993) (citing *United States v. Perez*, 402 U.S. 146, 150 (1971), and upholding § 2119 under the Commerce Clause because it protects an instrumentality of commerce).

Lastly, we note that Congress was not silent regarding the effect of carjacking on interstate commerce. As we stated in *Martinez*, Congress relied on, among other things, "the emergence of carjacking as a 'high-growth industry' that involves taking stolen vehicles to different states to retitle, exporting vehicles abroad, or selling cars to 'chop shops' to distribute various auto parts for sale." *Martinez*, 49 F.3d at 1400 n.2 (citing legislative history).

That Congress was addressing economic evils of an interstate nature differentiates the carjacking statute from the firearms statute invalidated in *Lopez*. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 115 S. Ct. at 1634. Carjacking, on the other hand, is exactly that sort of economic activity, as Congress clearly concluded. We accept that conclusion, and accordingly reject the defendants' contention.

IV.

Equal Protection

Having complained that carjacking does not impact interstate commerce, defendants Oliver and McMillan next argue that the carjacking statute violates equal protection because it only prohibits the theft of cars previously "transported, shipped, or received" in interstate commerce, and does not prohibit the theft of cars that have not been "transported, shipped or received" in interstate commerce. Because defendants did not raise this issue before the district court, we decline to address it on appeal. *See United States v. Cupa-Guillen*, 34 F.3d 860, 863-64 (9th Cir. 1994) (failure to present equal protection challenge to district court constitutes waiver of the claim).

V.

Double Jeopardy

Defendants contend that their convictions under § 2119 and § 924(c) violate the Double Jeopardy Clause

because both statutes punish the same conduct. This argument is also foreclosed by our recent opinion in *United States v. Martinez*, 49 F.3d at 1402.

VI.

Sufficiency of Evidence

Defendant Jones argues that there was insufficient evidence to support his carjacking conviction under the aiding and abetting theory. Although Jones moved for judgment of acquittal at the close of the government's case, he did not renew the motion at the close of all evidence. We therefore review for plain error. *United States v. Ramirez*, 880 F.2d 236, 238 (9th Cir. 1989).

Relying on *United States v. Dinkane*, 17 F.3d 1192 (9th Cir. 1992), Jones contends that he was not properly convicted of carjacking because there was no evidence that he possessed a firearm. *Dinkane* involved a conviction for armed bank robbery under 18 U.S.C. § 2113(d), an aggravated form of bank robbery under 18 U.S.C. § 2113(a). We noted that to sustain a § 2113(d) conviction for an aider and abettor, the government must show not only that the defendant knowingly and intentionally aided the act of bank robbery, but also the commission of the aggravating element. *Id.* at 1197. We therefore concluded that the defendant get-away driver could not be convicted of armed bank robbery under an aiding and abetting theory where there was no evidence that he knew – before or during the bank robbery – that the robbers had and intended to use weapons. *Id.* at 1198.

Contrary to Jones' contention, *Dikane* [sic] does not require that the government prove that he actually possessed the firearm. *Dikane* [sic] only requires proof that Jones knew that a co-defendant had and intended to use the firearm during a carjacking, and intended to aid in that endeavor. There was ample evidence of this.

The evidence demonstrated that, on the evening of the carjacking, Jones, Oliver and McMillan drove to a liquor store in Jones' car. Oliver testified that when he got into Jones' car, he noticed a gun on the floor of the back seat. Mutanna testified that when defendants approached him in the liquor store parking lot, he could see that Oliver was carrying a gun. Oliver held Mutanna and Mardaie at gunpoint, while Jones and McMillan rifled their pockets. Oliver also used his gun to keep Mutanna behind the store, and fired a shot from Jones' car, as Jones escaped in the Mutanna's car. A reasonable jury could have easily concluded from these facts that Jones knew Oliver had a firearm, that Jones knew Oliver intended to use the firearm during the carjacking, and that Jones intended to and did aid in that endeavor. Jones' conviction was not plain error.

VII.

Voluntary Intoxication Evidence

Defendant Oliver takes issue with the district court's refusal to allow evidence of his voluntary intoxication. We review the exclusion of evidence for abuse of discretion. *United States v. Rahm*, 996 F.2d 1405, 1410 (9th Cir. 1993).

As the district court correctly concluded, carjacking is a general intent crime, *Martinez*, 49 F.3d at 1401, and voluntary intoxication is not a defense to general intent crimes, *see, e.g., United States v. Sneezer*, 983 F.2d 920, 922 (9th Cir. 1992) (voluntary intoxication may be a defense to a specific intent crime, but is not a defense to a general intent crime). Nevertheless, Oliver argues that *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975), requires that he be allowed to present the evidence. In *Hartfield*, we held that evidence of drug intoxication was admissible because it related to the defendant's sanity during the time of the offense. *Id.* at 259-60.

Hartfield is not applicable to this case. First, Oliver did not present an insanity defense. Moreover, unlike the proffered testimony in *Hartfield*, Oliver's testimony would only show that he drank heavily on the day of the carjacking. This would not necessarily show that Oliver was incapable of committing the crime charged or appreciating the wrongfulness of his acts. Accordingly, we find no abuse of discretion in the district court's refusal to allow evidence of Oliver's voluntary intoxication.

VIII.

Serious Bodily Injury

Defendants also argue that "serious bodily injury" as set forth in § 2119(2) is an element of the carjacking offense which must be pleaded in the indictment and proved beyond a reasonable doubt at trial. Defendants point out that it was not until the sentencing phase that they became aware that there would be a contention that the case involved serious bodily injury for purposes of

§ 2119(2). The district court concluded that serious bodily injury is a factor which it was free to consider in sentencing defendants. We agree with the district court.

The Supreme Court has emphasized that the key to distinguishing between elements of an offense and sentencing factors is the legislature's definition of the elements of the offense. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). We therefore must look to the plain language and structure of the statute. *United States v. Young*, 936 F.2d 1050, 1054 (9th Cir. 1991). The carjacking statute, 18 U.S.C. § 2119, reads as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

In *United States v. Williams*, ___ F.3d ___, 1995 WL 236715. *7 (11th Cir. 1995), the Eleventh Circuit concluded that "Congress[ ] inten[ded] that subparagraphs (2) and (3) be treated as sentencing enhancement features, and not elements of the offense." According to the Eleventh Circuit, the natural reading of the text – in which the crime of carjacking is defined in the first paragraph and

the subparagraphs simply set forth different degrees of sentencing – suggests that the subparagraphs are sentencing provisions. *Id.* We agree with the Eleventh Circuit and conclude that the serious bodily injury and death language in § 2119 exist for sentence enhancement purposes. *See also United States v. Ryan*, 9 F.3d 660, 669 (8th Cir. 1993), *modified on other grounds*, 41 F.3d 361 (8th Cir. 1994) (en banc) (concluding that "if death results" provision of federal arson statute, 18 U.S.C. § 844(i), is sentencing enhancer), *cert. denied*, ___ S. Ct. ___, 1995 WL 50599 (1995); *United States v. Patterson*, 38 F.3d 139, 143-44 (4th Cir. 1994) (concluding that "if death or serious bodily injury results" language in 21 U.S.C. § 841(b)(1)(C) is sentencing enhancement), *cert. denied*, ___ S. Ct. ___, 1995 WL 50065 (1995). The plain text of the statute establishes one offense, as defined in the first main paragraph. That definition of the offense is set apart by a comma, followed by the word "shall" and then three sentencing possibilities. This does not establish three separate, substantive offenses.

Our decision in *United States v. Young*, 936 F.2d 1050 (9th Cir. 1991), is instructive. In that case, we determined that the weapon provision of 18 U.S.C. § 111 is a sentencing factor, rather than an element of the crime of assaulting a federal officer. The statute under which the defendant was convicted read as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than

> $5,000 or imprisoned not more than three (3) years, or both.
>
> Whoever, in the commission of such acts uses a deadly or dangerous weapon shall be fined not more than ten (10) years, or both.

18 U.S.C. § 111 (amended 1988). In concluding that Congress intended the weapon provision to be a sentencing factor, we noted that it was not "structurally separated from the rest of the section, indicating that the section contains only one substantive offense." *Young*, 936 F.2d at 1054. Moreover, the "weapon provision [was] not drafted as a stand-alone offense; it incorporate[d] the predicate acts by reference rather than affirmatively setting forth any specific elements." *Id.*; *see also Ryan*, 9 F.3d at 667 (use of semi-colons and the conjunction "and," as well as conclusion that latter sections of arson statute regarding resulting bodily injury and death could not stand alone, suggest treatment as a single offense).

Similarly, Congress did not enact § 2119 and its subparts in "structurally separate" provisions. It did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph. These factors lead to the conclusion that § 2119 sets forth one offense, with several possible penalties.

Defendants argue that Young is distinguishable because, in a subsequent amendment, the weapon provision of § 111 was specifically labelled "Enhanced Penalty," and therefore Congressional intent is clear. It is true that in *Young* we found this subsequent amendment to

have "persuasive value." *Young*, 936 F.2d at 1054.[1] But we have similar persuasive evidence of congressional intent in this case. Section 2119 was adopted as part of the overall "Anti-Car Theft Act of 1992" (the "Act"), enacted at a time when carjacking crimes were increasing at an alarming rate. *See* Public Law 102-519, 102nd Congress, 106 STAT 3384 (1992). In the Act, § 2119 and its subparagraphs come directly under the title, "Tougher Law Enforcement Against Auto Theft," and the subtitle, "*Enhanced Penalties* for Auto Theft." *Id.* (emphasis added). Clearly the title, and undoubtedly the subtitle, suggest an intent that § 2119 set forth enhanced penalties. Other portions of the legislative history suggest the same conclusion. *See, e.g.*, H.R.Rep. No. 102-851(II), 102nd Cong., 2d. Sess. 14, *reprinted in*, 1992 U.S.C.C.A.N. 2847 ("the Committee adopted an amendment . . . increasing the maximum prison term for carjacking to 25 years, instead of 15 years . . . when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine."); H.R.Rep. No. 102-851(II), 102nd Cong., 2d. Sess. 30, 1992 U.S.C.C.A.N. 2863 ("H.R. 4542 also would provide for new and enhanced penalties (including fines) for certain crimes, including armed robberies of motor vehicles . . . "); H.R.Rep. No. 102-851(II), 102nd Cong., 2d. Sess. 61, 1992 U.S.C.C.A.N. 2894 ("The Committee's substitute also increased the penalty for 'carjackings' when serious bodily injury occurs over and above the penalties in the bill reported by the Judiciary Committee."). In fact,

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[1] Although we recognized that "the view of a later Congress does not establish definitely the meaning of an earlier enactment." *Id.*

nothing in our review of the Act or its legislative history even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt at trial.

We also reject defendants' contention that the carjacking statute is similar to the statute construed in *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992). In *Gonzalez-Medina*, we concluded that the provisions of 8 U.S.C. § 1326,[2] dealing with the deportation of

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[2] The statute provides in relevant part:

(a) Subject to subsection (b) of this section, any alien who –

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisonment not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection –

(1) whose deportation was subsequent to a conviction for commission of a felony

aliens, comprised two separate crimes, with separate elements. Unlike the subparagraphs of the carjacking statute, § 1326(a) and (b) stand alone, each with its own elements and sentence provisions. Subsection (a) states that it is "subject to subsection (b);" while subsection (b) contains the language "[n]otwithstanding subsection (a)." The structure and language of § 1326 is very different from that of the carjacking statute; *Gonzalez-Medina* is not controlling.

While defendants were not informed through the indictment or at arraignment that they were facing the 25-year maximum, this omission does not amount to a due process violation. *See, e.g., Young*, 936 F.2d at 1053 (indictment need not plead sentencing factor); *LaMere v. Risley*, 827 F.2d 622, 624 (9th Cir. 1987) (notice in the information that government will seek sentence enhancement not necessary); *United States v. Dunn*, 946 F.2d 615, 619 (9th Cir.) (prior violent felonies used for sentence enhancement need not be charged in indictment or proved at trial), *cert. denied*, 502 U.S. 950 (1991). The evidence at trial suggested that Mutanna suffered injury. The probation department reported in the presentence

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(other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 15 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 15 years, or both.

report that Mutanna suffered a perforated eardrum, causing numbness and some hearing loss, and defendants were given medical reports on the condition. Defendants concede that they were given an opportunity to contest the issue at sentencing. We note that defendants have never demonstrated that the information in the presentence report was inaccurate, or that the district court erred in determining that Mutanna suffered serious bodily injury. Having concluded that serious bodily injury is not an element of the offense, we are compelled to find that defendants received sufficient process for purposes of the Fifth Amendment. *See, e.g., West*, 826 F.2d at 912 (due process satisfied where prior convictions used for sentence enhancement were detailed in presentence report, defendant did not challenge prior convictions, and defendant did not show information in presentence report was materially false); *United States v. McDougherty*, 920 F.2d 569, 575 (9th Cir. 1990) (due process satisfied where sentencing enhancement factors are alleged in presentence report and proven by a preponderance of evidence), *cert. denied*, 499 U.S. 911 (1991).

IX.

Sentencing Guideline Issues

Defendants contend that the district court committed various sentencing errors. We review the district court's interpretation and application of the United States Sentencing Guidelines ("U.S.S.G.") de novo, while we review the district court's factual findings in the sentencing phase for clear error. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994).

A. Abduction

In sentencing defendants, the district court applied U.S.S.G. § 2B3.1(b)(4)(A), which provides for a four-level increase "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." "Abducted" is defined as "forced to accompany an offender to a different location." U.S.S.G. § 1B1.1. Defendants argue that although Mardaie was in the stolen car when Jones drove it away, there was no indication that this facilitated either the offense or the escape. We disagree.

There can be no dispute that Mardaie was forced to accompany Jones as he drove the stolen car away from the crime scene. Jones followed Oliver and McMillan, who left the scene in Jones' car. The evidence easily supports the conclusion that the abduction made a quicker get-away possible and prevented Mardaie from crying out or calling the police. Furthermore, on this record, it is entirely possible that Jones thought he was taking the only living witness away from the crime. The district court's conclusion that Mardaie's abduction facilitated defendants' escape was not clear error.[3] We also reject Oliver's and McMillan's suggestion that the district court failed to make the requisite findings regarding their role in the abduction under U.S.S.G. § 1B1.3. That section

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[3] The district court also concluded that Mardaie's abduction facilitated the offense. Because the district court soundly concluded that the abduction facilitated defendants' escape, we need not reach that issue. *See United States v. Hernandez-Valenzuela*, 932 F.2d 803, 805 (9th Cir. 1991) (where the district court gives two alternative grounds for enhancement, so long as one ground is proper, no remand is necessary).

provides that a defendant may be accountable for the conduct of others that was "in furtherance of the jointly undertaken criminal activity" and "reasonably foreseeable in connection with that criminal activity." *See* U.S.S.G. § 1B1.3, comment. (n. 2). We think it is obvious from the district court's rulings that he found the abduction to be in furtherance of the carjacking and foreseeable to defendants. And, as the discussion above demonstrates, this conclusion was fully supported by the evidence. *See United States v. Slater*, 971 F.2d 626, 633 (9th Cir. 1992) (district court need only make generalized statement of its reasons for enhancement, so appellate court may tie sentencing decision to a factual basis in the record).

B. Obstruction of Justice

At the sentencing hearing, the district court applied a two-level adjustment to defendant Oliver's sentence concluding that he testified untruthfully at trial. After Oliver filed his notice of appeal, however, the district court issued a Sentencing Order in which it retracted the obstruction of justice enhancement for Oliver. The district court stated that Oliver's testimony at trial not rise to a level warranting enhancement. Although the district court determined that obstruction of justice was not applicable, it did not recalculate Oliver's sentence without the two-level adjustment. Oliver argues that in light of this discrepancy, his sentence should be remanded, and we agree.

The commentary to § 3C1.1 provides that "testimony and statements should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment. (n. 1). We give great weight to the district court's assessment of Oliver's testimony. *See United States v. Barbosa*, 906 F.2d 1366, 1370 (9th Cir. 1990) (appellate court should give "due regard to the opportunity of the district court to judge the credibility of the witnesses"). Because the district court indicated that application of § 3C1.1 was not warranted, we remand this case for recalculation of defendant Oliver's sentence without the two-level adjustment.

C. Criminal History

Upon remand, the district court is also instructed to reconsider the appropriate Criminal History Category for Oliver. At sentencing, the district court adopted the presentence report finding that Oliver had nine criminal history points and a Criminal History Category of IV. However, the district court's subsequent Sentencing Order suggested that Oliver had only six criminal history points, which would be a Criminal History Category of III. Although this discrepancy may have been nothing more than a clerical error, the district court should clarify the appropriate Criminal History Category and resulting sentence on remand.

D. Upward Departures

Finally, defendants argue that the district court erred in departing upward on their sentences. The district court relied on the presentence reports, which recommended an

upward departure pursuant to U.S.S.G. § 2K2.4 to a total term of 360 months.[4] However, the probation department, and thus the district court, erred in applying § 2K2.4. Although defendants did not raise the issue before the district court, we address the issue to prevent a miscarriage of justice, and to ensure that defendants' do not serve sentences that exceed the guideline maximum. *See United States v. Young*, 470 U.S. 1, 15 (1985) (plain error doctrine permits the court to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings"); *see also United States v. Agoro*, 996 F.2d 1288, 1291 (1st Cir. 1993) (addressing unpreserved legal claim to prevent defendant from serving sentence exceeding guidelines).

Pursuant to U.S.S.G. § 2B3.1(b)(2)(A), a 7-level enhancement would have normally been applicable to defendants' carjacking sentences because a gun was discharged during the offense. However, because defendants were also convicted of using a firearm under § 924(c), which carries a mandatory consecutive five year sentence, defendants' carjacking sentences were not subject to the 7-level enhancement. *See* U.S.S.G. § 2K2.4, comment. (n. 2). U.S.S.G. § 2K2.4 provides for an upward

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[4] U.S.S.G. § 5K2.3, which provides for departure on the basis of "extreme psychological injury" to the victim, did not factor into the probation department's recommended 360-month sentences. The district court suggested that § 5K2.3 was an additional ground for departure, but did not attribute any specific amount of its departure to that basis. Because the district court adopted the presentence reports, it apparently believed that departure to 360 months was justified under § 2K2.4 alone.

departure in those cases where the guideline range for the underlying offense (without the seven-level enhancement), when combined with the mandatory five-year sentence under § 924(c), produces a total maximum penalty that is less than the maximum of the guideline range that would have been applicable if there was no conviction under § 924(c). The upward departure may not exceed "the maximum of the guideline range that would have resulted had there not been a count of conviction under [Sec. 924(c)]." *Id.*

There is no dispute that defendants' guideline ranges would have been greater without a conviction under § 924(c). While upward departure was therefore appropriate, that departure could not exceed the maximum of the guideline range that would have been applicable without the § 924(c) conviction. In other words, the maximum combined penalty for the underlying carjacking conviction *plus* the § 924(c) conviction could not exceed the maximum penalty available for the carjacking conviction with the seven-level enhancement. For each defendant, the maximum guideline range absent their § 924(c) conviction (and with the 7-level enhancement) was limited to 300 months (25 years) – the statutory maximum penalty for carjacking resulting in serious bodily injury. *See* U.S.S.G. § 5G1.1 (providing that the guideline range is restricted by the statutorily authorized maximum penalty). Therefore, with an upward departure under § 2K2.4, the *total* sentence for each defendant could not exceed 300 months (or 240 months for the carjacking conviction plus consecutive 60 months for the § 924(c) conviction). That is the maximum penalty that would have been applicable "had there not been a count of

conviction under § 924(c)." U.S.S.G. § 2K2.4, comment. (n. 2). Because the district court erred in applying § 2K2.4 to increase defendants' total sentences to 360 months, we vacate and remand for resentencing.

We express no opinion here as to whether, or to what extent, additional departure may be warranted under U.S.S.G. § 5K2.3. Should the district court attribute any amount of departure to § 5K2.3 on remand, it should specify why the psychological injury in this case is more severe than that which would normally occur to a victim of this type of crime. *See* U.S.S.G. § 5K2.3 (departure may be warranted if a victim "suffered psychological injury much more serious than that normally resulting from commission of the offense").

AFFIRMED in part, and VACATED and REMANDED in part.

United States Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

Donovan Dwayne OLIVER; Darryl Lee McMILLAN; Nathaniel JONES, Defendant-Appellants.

Nos. 96-10176, 96-10177, 96-10179.

Submitted April 21, 1997**

Decided June 27, 1997.

Appeal from the United States District Court for the Eastern District of California; No. CR-92-05264-REC; Robert E. Coyle, District Judge, Presiding

Before: HUG, Chief Judge, CANBY and HAWKINS, Circuit Judges.

MEMORANDUM*

Donovan Oliver, Darryl McMillan, and Nathaniel Jones appeal their sentences imposed on resentencing following their convictions for carjacking in violation of 18 U.S.C. § 2119 and for use of a firearm in violation of 18

** The panel finds this case appropriate for submission without argument pursuant to Fed.R.App.P. 34(a) and Ninth Circuit Rule 34-4.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 924(c). In a prior appeal, we affirmed defendants' convictions but remanded for resentencing. We now affirm their sentences.

The district court was not required to identify an independent basis for its departures when it resentenced defendants to the maximum sentence allowed - 300 months. Both our earlier opinion in this case, *United States v. Oliver*, 60 F.3d 547, 556 (9th Cir.1995), and U.S.S.G. § 2K2.4 itself, make clear that the district court could rely on this guideline alone to depart upward. Furthermore, the upward departures here were not unreasonable because defendants were sentenced at the top of the guideline ranges that would result absent the § 924(c) convictions.

We also find no merit in Oliver's and McMillan's contention that the district court violated the Ex Post Facto Clause by using the 1993 Guidelines in effect at the time of sentencing, rather than the 1992 Guidelines in effect at the time of their offenses. The Ex Post Facto Clause is violated when a guideline change (1) applies to events before its enactment, and (2) disadvantages the defendant. *United States v. Carson*, 988 F.2d 80, 81-82 (9th Cir.1993). No such violation occurred here, however, because as the government correctly notes, the 1993 Guidelines are actually more favorable to defendants. Under the 1992 Guidelines, the district court would have had to apply a seven-level enhancement for discharge of a firearm. U.S.S.G. § 2B3.1(b)(2)(A) (1992). The 1993 Guidelines, by contrast, forbid such an enhancement under these circumstances, instead authorizing a district court to depart upward to correct any injustice. Even after accounting for the two-point enhancement for

carjacking under the 1993 Guidelines, U.S.S.G. § 2B3.1(b)(1)(B), therefore, defendants' guideline ranges were lower under the 1993 version. Moreover, the upward departure provision did not prejudice the defendants because the district judge made clear that under either set of Guidelines he would sentence the defendants to the 300 months that our remand imposed as an upper limit.

Supreme Court of the United States

JONES, NATHANIEL

v.

UNITED STATES.

No. 97-6203.

March 30, 1998.

The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari is granted.

Supreme Court of the United States

JONES, NATHANIEL

v.

UNITED STATES.

No. 97-6203.

April 6, 1998.

The order entered March 30, 1998, granting a writ of certiorari is amended as follows: 'The writ of certiorari is limited to the following questions: 1. Does 18 U. S. C. §2119(1)-(3) describe sentencing factors or elements of the offense? 2. If 18 U. S. C. §2119(1)-(3) sets forth sentencing factors, is the statute constitutional?'